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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 1380

PETER L. YOUNG,
Petitioner,

vs.

TERRITORY OF HAWAII,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

FRED PATTERSON,
McCandless Building, Honolulu, Hawaii,
Counsel for Petitioner.

E. J. BOTTS,
Stangenwald Building, Honolulu, Hawaii,

HERBERT CHAMBERLIN,
Russ Building, San Francisco, California,
Of Counsel.

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To the Honorable Supreme Court of the United States:

Petitioner, Peter L. Young, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the final judgment of said court, entered March 5, 1947, dismissing his appeal from the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW.

The record contains the opinion of the Supreme Court of the Territory of Hawaii. R. 36-52. The record also contains the opinion of the Circuit Court of Appeals and the dissenting opinion of Denman, C.J. R. 68-72, 72-78. No opinion was rendered by the Circuit Court of Appeals in denying a petition for rehearing on April 19, 1947. R. 80.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted, R. 2, and convicted, R. 27, of the crime of abortion in the Circuit Court of the First Judicial District, Territory of Hawaii. At the trial, the following instruction was given over obpection, R. 8-9:

> "I further instruct you that the burden of proof is upon the Territory and the law presumes the defendant to be innocent, and this presumption continues and attends him at every stage of the case until it has been overcome by evidence which proved him guilty to your satisfaction and beyond a reasonable doubt. And in this connection, I instruct you that the doubt which will entitle the defendant to an acquittal must be a reasonable doubt, not a conjured-up doubt, such a doubt as you might conjure up to acquit a friend, *but a doubt that you could give a reason for.*
>
> *A reasonable doubt is not a* slight doubt, not a *probable doubt,* not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the

> accused, because everything relating to human affairs and depending upon mortal evidence is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. The real question is whether after hearing the evidence and from the evidence you have or have not an abiding belief, amounting to a moral certainty that the defendant is guilty and if you have such belief so formed it is your duty to convict him and if you have not such belief it is your duty to acquit." (Emphasis added.)

Petitioner prosecuted a writ of error to the Supreme Court of the Territory of Hawaii. R. 28-29. The giving of this instruction was assigned as error and it was quoted in full. R. 33-34. It was quoted in full in the opinion of that court affirming the judgment. R. 38. It was there upheld, the court saying that "From long-continued use and uniform approval by this court when before it for review, it has assumed the dignity of a stock instruction". R. 41.

Petitioner then prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. R. 54. In his assignment of errors, the challenged instruction was again quoted in full. R. 56. In petitioner's original brief filed with that court the claim of error was centered upon that part of the instruction which told the jury that a reasonable doubt must be "a doubt that you could give a reason for". At the oral argument before that court on August 30, 1946, the claim of error was broadened to include that part of the instruction which told the jury that "a

reasonable doubt is not a . . . probable doubt". Petitioner then asked and was granted 30 days to file a further brief directed to the points orally argued. R. 67. Pursuant to such permission a supplemental brief was thereafter filed by petitioner. R. 77.

The Circuit Court of Appeals dismissed the appeal, saying "that no federal question of substance is presented by the appeal", and that "the whole instruction, this phrase included, was before the supreme court of the territory and had its approval as being in line with long-settled territorial practice". R. 72. In the dissenting opinion of Denman, C.J., it was said that "this appeal clearly presents a constitutional question of paramount substance within 28 Judicial Code, sec. 128 (a) . . . It should be answered in a reversal of the judgment from which the appeal is taken", and that "no Hawaii reported case, not even the present one, construed the challenged words". R. 75, 77.

The case, manifestly, presents an important question under the Fifth Amendment to the Constitution as to due process of law in criminal actions.

JURISDICTION.

Jurisdiction of this court is invoked under section 240 (a) of the Judicial Code. 28 U.S.C.A., sec. 347.

QUESTIONS PRESENTED.

1. Was petitioner denied due process of law by an instruction in a territorial court telling the jury in a criminal action that a reasonable doubt must be "a doubt that you could give a reason for", and "is not a probable doubt"?

2. Was the Circuit Court of Appeals bound by the territorial Supreme Court's conception of due process of law?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH ITS OWN DECISIONS AND CONTRARY TO ESTABLISHED PRINCIPLES ON AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

The subject of reasonable doubt has been considered by the Circuit Court of Appeals for the Ninth Circuit on many occasions. Among those decisions appear the following:

Rose v. United States, 1945, 149 F. 2d 755, 759.

Henderson v. United States, 1944, 143 F. 2d 681, 682.

Pon Wing Quong v. United States, 1940, 111 F. 2d 751, 757.

Paddock v. United States, 1935, 79 F. 2d 872, 876, 877.

De Groot v. United States, 1935, 78 F. 2d 244, 251, 252.

Kearns v. United States, 1928, 27 F. 2d 854, 855.

Arine v. United States, 1926, 10 F. 2d 778, 780, 781.

Dell 'Aira v. United States, 1926, 10 F. 2d 102, 106.

Raffour v. United States, 1922, 284 F. 720, 721.

McCurry v. United States, 1922, 281 F. 532, 533.

Crane v. United States, 1919, 259 F. 480, 483, 484.

Louie Ding v. United States, 1917, 246 F. 80, 83.

Sheppard v. United States, 1916, 236 F. 73, 80.

Griggs v. United States, 1908, 158 F. 572, 577, 578.

Owens v. United States, 1904, 130 F. 279, 283.

In three of the cited cases the court considered instructions containing language which in substance told the jury that a "reasonable doubt" was "a doubt that you could give a reason for". The first case was *Owens v. United States,* 130 F. 279, 283, where the instruction was thus phrased: "A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. *It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence".* (Emphasis added.) The emphasized language was disapproved, the court saying, at page 283:

> "A doubt arising out of evidence is a mental operation for which it may often be very difficult, and, indeed, impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon, for they are only authorized to bring in a verdict of guilty when

satisfied and convinced beyond a reasonable doubt of the guilt of the accused."

The second case was *Griggs v. United States,* 158 F. 572, 577, where the instruction was as follows: "The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined; *but it is a doubt which must arise from the evidence or lack of evidence, and for which some reason can be given".* (Emphasis added.) Again the court disapproved the language emphasized, but did not regard it as reversible error in the particular case. A dissenting opinion by the judge who wrote the opinion in the *Owens* case held that the instruction was reversible error.

And the third case was *Louie Ding v. United States,* 246 F. 80, 83, where the instruction was as follows: *"Now a 'reasonable doubt' is just such a doubt for which you can give a reason.* When a juror is convinced to a moral certainty of the truth of the fact, then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural, or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions". (Emphasis added.) Once more, the court disapproved the language emphasized but did not regard it as reversible error in the particular case.

In each of the three cited cases it is therefore plain that the court regarded the challenged language as error, but not amounting to prejudicial error in the particular case. In none of these cases, however, did the court consider an instruction where, as here, such erroneous language was supplemented by a declaration that "A reasonable doubt is . . . not a probable doubt".

Five of the cited cases consider the question of "probable doubt". (*Rose v. United States,* 149 F. 2d 755, 769; *Henderson v. United States,* 143 F. 2d 681, 682; *Pon Wing Quong v. United States,* 111 F. 2d 751, 757; *Kearns v. United States,* 27 F. 2d 854, 855; *Arine v. United States,* 10 F. 2d 778, 780, 781.) Quotations are made from two of them.

In *Rose v. United States,* 149 F. 2d 755, 759, it was said:

> "It should be remembered too, that: 'The proof in a criminal case need not exclude all doubt. * * * The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt.' Henderson v. United States, 9 Cir. 1944, 143 F2d 681, 682."

And in *Arine v. United States,* 10 F. 2d 778, 780, 781, it was said:

> "In defining reasonable doubt the court said: 'If you have a persistent judgment to a very high degree of probability that the defendant is guilty as charged, you have no reasonable doubt, and you are bound to convict him.' A number of courts

> have held that conviction beyond a reasonable doubt means more than a conclusion that there is a very high probability of guilt. * * * We think the court erred in his definition of reasonable doubt."

These last quotations make it obvious that the Circuit Court of Appeals for the Ninth Circuit has heretofore followed the traditional rule that a "reasonable doubt" justifying acquittal in a criminal action may be a "probable doubt". But here, as the minority opinion points out, R. 74, the "court's opinion holds that a juror who doubts as a probability the guilt of an accused man must find him guilty *even if he can give a reason* for his probable innocence". Here, then, is palpable failure by the court to follow the admonition of this court that all courts should be ever watchful of the constitutional rights of citizens and to guard against stealthy encroachments thereon. (*Byars v. United States,* 273 U.S. 28, 32, 47 S.Ct. 248, 249, 71 L.Ed. 523.) And here, as the minority opinion also points out, R. 78, "It is not this convicted abortionist alone for whom the Constitution has been violated but a principle has been established which may wrongfully affect every person charged with crime in a federal court of the circuit".

2. **THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND WITH STATUTE ON THE IMPORTANT QUESTION OF THE SCOPE OF ITS REVIEW OF THE JUDGMENTS OF THE SUPREME COURT OF THE TERRITORY OF HAWAII.**

The Supreme Court of the Territory of Hawaii exercises its authority under section 81 of the Hawaiian Organic Act. 48 U.S.C.A., sec. 63. In the exercise of that authority its decisions must be in conformity with the Constitution of the United States. (*Waialua Agr. Co. v. Christian,* 305 U.S. 91, 103, 59 S.Ct. 21, 30, 81 L.Ed. 60.) It cannot deprive an individual of his Constitutional guarantees by an application of territorial law. (*Duncan v. Kahanamoku,* 327 U.S. 304, 318, 66 S.Ct. 606, 613.) "Civilians in Hawaii are entitled to the Constitutional guarantees of a fair trial to the same extent as those who live in any other part of our country". (*Duncan v. Kahanamoku,* 327 U.S. 304, 318, 66 S.Ct. 606, 613.)

Statute vests the Circuit Court of Appeals for the Ninth Circuit with appellate jurisdiction to review by appeal final decisions "In the Supreme Court of the Territory of Hawaii * * *, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; * * *." Jud. Code, sec. 128, 28 U.S.C.A., sec. 225. The denial of asserted rights based upon the Fifth Amendment presents a question within such jurisdiction. (*Lovato v. New Mexico,* 242 U.S. 199, 37 S.Ct. 107, 108, 61 LEd. 244.)

The challenged instruction was upheld by the Circuit Court of Appeals because the territorial Supreme Court in upholding it said that "from long-continued use and uniform approval by this court when before it for review, it has assumed the dignity of a stock instruction". R. 70, 71. But, as the minority opinion points out, R. 75:

> "This question of 'probable doubt' was not considered by the Hawaiian supreme court. It was construing solely the question whether a reasonable doubt must be one for which a reason must be given. What that court has done is to approve sub silentio an instruction which also permits a juror to vote for conviction though he thinks the accused probably innocent. Its statement that the challenged instruction has been customarily given referred solely to the ability to give a reason for the doubt. None of the cases considered in the Hawaiian reports by that court considered the question whether a jury having a probable doubt of guilt could convict."

The scope of the court's review of the Hawaiian judgment was too narrow and actually a refusal to exercise its proper jurisdiction. Petitioner was entitled to a decision on constitutional law. What he received was merely a re-decision on Hawaiian law. The result is obvious: In Hawaii it is due process of law for a jury to find a defendant guilty although it has a probable doubt of his guilt and can give a reason for his probable innocence, whereas elsewhere in this country a similar finding is a denial of due process of law. That result, of course, cannot survive

an application of the principles announced and applied by this court in the *Duncan* case.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final judgment of said court dismissing the appeal in said cause be reviewed and reversed.

Dated, San Francisco, California,
May 9, 1947.

FRED PATTERSON,
Counsel for Petitioner.

E. J. BOTTS,
HERBERT CHAMBERLIN,
Of Counsel.